

A power struggle or something more?

The current disqualification saga at the United Nations International Residual Mechanism for Criminal Tribunals

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The past six months at the United Nations International Residual Mechanism for Criminal Tribunals, the successor organisation of the International Criminal Tribunals for the former Yugoslavia and Rwanda (in the following: the Mechanism), have witnessed an unprecedented series of disqualification motions in both the Mladić and Karadžić appeals trials. While the events have been largely claimed to be the result of an internal power struggle between two senior judges at the Mechanism and the Prosecution, it is interesting to also take a look at the legal merits of the arguments brought forward. After a comprehensive overview of the complicated array of motions and decisions filed, this article will briefly comment on that second point.

The central underlying provision and legal basis for disqualification requests is found in Rule 18 of the Rules of Procedure and Evidence of the Mechanism. In its substantive parts in paragraph A it reads that ‘A Judge may not sit in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.’

The spark that started the fire

The original disqualification motions were filed in [June 2018](#) by the Mladić defence team. They contained submissions against the judges Theodor Meron, Carmel Agius and Liu Daqun. The basic argument of all motions was that explicit findings of the judges in previous cases on the accused’s role, contribution and knowledge of certain crimes, as well as his responsibility ‘[gave] rise to an unacceptable appearance of bias that would lead a reasonable observer, properly informed, to apprehend bias in the context of his appeal’.

The motions as such were not a surprise – attempts to disqualify judges had been made before at the Tribunals, however mostly unsuccessful. This is why Judge Antonetti’s [decision of 3 September 2018](#) was all the more surprising. He fully granted the motions of the Defence due to the appearance of bias. All three judges had made findings in the context of a number of previous decisions concerning the guilt of the accused for crimes currently contested in his appeal, especially with regard to questions concerning the chain of command and modes of liability, such as the ICTY established joint criminal enterprise. According to Judge Antonetti, these findings constitute sufficient ground for a reasonable observer, properly informed,

to reasonably apprehend bias. He also notes that the tribunals took a high risk with regard to the impartiality of judges, by allowing them to sit in several cases relating to the same set of factual and legal questions. Antonetti finally points out that the Mechanism currently has 24 judges at its disposal, which easily makes it possible to appoint judges, who were uninvolved in any previous decisions concerning facts related to Mladić altogether.

The firestorm that followed

It was not long before the Karadžić defence team reacted and went down the same road as the defence of his former head of military. The [original disqualification motion](#) of 25 September 2018 in essence brought forward the same arguments as those in Mladić, directed at Judge Theodor Meron; a [second one](#) followed on 12 October 2018 with regard to Judge Sekule. The following developments in this case, however, unfolded in a far more complex manner.

Judge Meron anticipated a formal reaction of the Chamber by voluntarily [withdrawing from the proceedings on 27 September 2018](#). He justified this decision with not wanting to delay the proceedings and harm the interests of the Mechanism any further, while emphasizing at the same time that he would have kept an impartial mind nonetheless. The tone gets noticeably harsher when Meron states that ‘the Mladić Disqualification Decision clearly contradicts established jurisprudence’ and (...) harms the interests of the Mechanism by wrongly suggesting that “there is a risk in terms of appearance where the superior officer [...] is being tried, even on appeal by the judge who found his subordinates guilty”.

In the following weeks, several motions were filed regarding jurisdictional and administrative matters, more specifically on who was competent to decide on which qualification motion and the replacement judges in each case. This issue was particularly relevant in this case due to Meron’s double function as both the President of the Mechanism and one of the judges involved in the appeals cases. These procedural aspects are laid down in Rule 18 (B) (i), (ii) and (iv), which state that the disqualification application is to be made to the President and the decision to be taken by him or, if the motion concerns him, the most senior judge able to act.

The Prosecution got involved in the substantial disqualification proceedings on 25 October 2018 with a [motion brought against Judge Antonetti](#). The tone certainly did not get any less harsh. The Prosecution claims that Antonetti has a history of disregarding precedent to the prejudice of the Prosecution and additionally has a personal interest in maintaining what they call the ‘Antonetti test’ (the new disqualification standard developed by him in Mladić). The motion also brings up personal animosities between Antonetti and Meron. The Prosecution finally claims that Antonetti would not even pass the ‘Antonetti test’ himself, as he had ruled on a disqualification matter concerning Judge Meron before.

Because of the jurisdictional side story to the substantive disqualification matters, the disqualification motion against Antonetti never got decided on. On 6 November 2018, Judge Meron [dismissed the Prosecution’s disqualification motion as moot](#). But the jurisdictional disagreement remains – Judge Antonetti issued a [separate](#)

[response](#) with ‘observations for the President’, in which he declares the motion as unfounded. A highly unusual course of action, which marks the provisional end of the disqualification saga.

What remains once the dust has settled?

The tone of several of the motions suggests that it was presumably personal power struggles between the two senior judges at the Mechanism and the Prosecution, which determined the handling of the avalanche of disqualification motions. The fact that those dominate recent discussions in the last two major cases of the Mechanism is unpleasant and damages the reputation of the good work the Mechanism and its precursor Tribunals have accomplished over many years. However, now that the dust is starting to settle, a closer look at the actual legal question at hand and the facts and problems behind the disqualification saga is pertinent. It shows that the situation at the ICTY and ICTR as well as the Mechanism is a unique one in this regard and might be more complex than it seems at first glance.

There are several reasons for that. Firstly, the ad-hoc character of the tribunals, which limited them to deal with ‘only’ one particular conflict from the outset. Secondly, the fact that the Prosecution followed a so-called pyramidal prosecutorial strategy, bringing cases against perpetrators located relatively low in the hierarchy first (as for example in the first judgement of the ICTY, Tadić), to be able to build a case against the more senior people responsible, such as Mladić and Karadžić, later on. Thirdly, the Tribunals are – inter alia – known for the establishment of extremely wide modes of liability, e.g. the (controversial) joint criminal enterprise.

All of these factors taken together have the effect that cases before the Tribunals and the Mechanism are far more intertwined than those before the International Criminal Court for example. Certain facts and legal questions are bound to reappear in a number of cases. Judges were and are involved in a number of cases that deal with the same set of facts and legal questions, and therefore, even if only indirectly, deal with the question of the guilt of the accused in other, subsequent cases. The question if these multiple involvements are desirable and compatible with the relevant legal provisions is not an illegitimate one per se. Especially when one keeps in mind that actual bias is not even necessary for a disqualification – the mere appearance of such is sufficient. The organisational structure of the Mechanism allows for the assignment of previously altogether uninvolved judges, so why not make use of it? The above-mentioned unique mandate, structure and legal novelties of the Tribunals and the Mechanism have enabled them to work efficiently and successfully through hundreds of cases. With regard to the challenge of preventing even the slightest doubt as to the impartiality of judges, these features might be curse and blessing at the same time.

Elisabeth Baier is a German qualified lawyer who holds a degree in law from the University of Passau and has passed the bar exam at the Court of Appeal in Berlin. She will graduate as an LL.M. student from the London School of Economics and Political Science in December 2018 with a specialisation in Public International Law

and is currently working at the International Criminal Court, funded by the Carlo-Schmid-Fellowship.

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